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88-557

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1988

THE STATE OF MICHIGAN
Petitioner

v.

REGINALD D. LEIGH
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

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STATEMENT OF THE QUESTION PRESENTED

I

SHOULD CERTIORARI BE GRANTED TO RESOLVE THE SPLIT AMONGST FEDERAL CIRCUITS AND THAT AMONGST STATE COURTS AS TO WHETHER A NECESSARY ELEMENT OF A DUE PROCESS "DELAY IN ARREST" CLAIM IS THAT THE DELAY ON THE PART OF THE GOVERNMENT WAS FOR THE PURPOSE OF GAINING A TACTICAL ADVANTAGE OVER THE ACCUSED?

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NOW COMES the State of Michigan, by John D. O'Hair, Prosecuting Attorney for the County of Wayne, and Timothy A. Baughman, Chief of the Criminal Division, Research, Training and Appeals, and prays that a writ of certiorari issue to review the judgment of the Michigan Court of Appeals entered in the above cause on June 9, 1988, leave denied by the Michigan Supreme Court on September 13, 1988 with two justices dissenting.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is appended as Appendix A. The order of the Michigan Supreme Court denying leave to appeal is appended as Appendix B.

STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals was entered on June 9, 1988. The order of the Michigan Supreme Court was entered on September 13, 1988. The jurisdiction of this Court is invoked under 28 USC 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment provides, in pertinent part, that no person shall be deprived of liberty without "due process of law."

STATEMENT OF THE CASE

In the instant case respondent was charged with Possession With Intent To Deliver Cocaine. On February 13, 1987 respondent brought a motion to dismiss based on a denial of due process argument (the Michigan Court of Appeals also stated that "The dismissal stems from defendant's claim that he was denied due process....")

In response to respondent's motion testimony was taken from Police Officer Franscott Fowler of the Detroit Police Narcotics Section. Officer Fowler testified that he was working on May 8, 1986 and that he was one of the officer's responsible for executing a Search Warrant at Reggie's Hair Salon at 9314 Woodward in the City of Detroit. (T. 7) He further testified that as a result of

that search respondent was arrested. After respondent was arrested a Not-In-Custody warrant (warrant which is issued when respondent is released and not in the custody of the police department) was prepared. (T. 8) Officer Fowler further indicated that there was a need for a laboratory analysis and that getting that analysis caused some delay because the lab was operating short of people. The shortage of lab people was one of the reasons why respondent's warrant request was a Not-In-Custody warrant request. (T. 9-10) This initial warrant request was denied by the prosecutor in part because the lock seal folder numbers were missing from the PCRs (the officers' Preliminary Complaint Reports) and in part because the lab analysis had not been completed. The lab analysis sheets were submitted to the lab the day after the arrest, May 9, 1986,

but the analysis could not be completed until August 30,1986. The officer further testified that he had no plan or scheme or desire to hold property from the respondent. (T. 10-11) After the laboratory analysis was completed a second warrant request was sought in December 1986. (T. 12-13)

Respondent made no specific allegations of prejudice nor did he allege intentional delay on the part of the police or prosecution to gain tactical advantage over the respondent, but rather, respondent argued:

> "now in that period of time, one, your memory is vague, people move, people change addresses. This is like two-thirds of the year. Then you come with a warrant and you don't have the jacket and I don't know where the jacket is, whether it was taken by them or not.

> But, the Officer who testified at the exam said they don't have the jacket. And, now you are going to say 'These narcotics that was found in the jacket, in an area where other people were found also belongs to the defendant." With no jacket to try it on, no witnesses to testify who it may have belonged to. This puts the defendant in a position which is totally untenorable (sic) and unjust. He could not conceivably now get a hold of the people that could testify because of this delay. And, the delay, your Honor, is unwarranted, unjustified. There is no reason for it, other than to the net result whether it was intentional or not as to prejudice the defendant. The delay doesn't have to be intentional. It is the net result that it is an unexplainable delay and that innures (sic) to his prejudice and certainly it is obvious that it so innures (sic)."(T. 26-28) (Emphasis Added)

The trial Prosecutor argued to the Court that respondent has no right to be arrested and that respondent had misapplied the law as it relates to a due process, speedy arrest claim. (T. 28-32)

The Court then ruled as follows:

Now, it is my understanding that there are two motions that have been presented by Mr. Sherman. The first motion he argued it and that motion complains that because of a delay of 225 days from the time of the alleged criminal activity and the arrest that his client has been unduly prejudiced and his Constitutional Rights therefore have been violated and for that reason this case should be dismissed.

This case, to me, is somewhat similar to the case of People v Hernandez in which there was a delay of some 42 days. There was a situation where there had been a dope -- alleged dope transaction, drug transaction, purchase made and later a search warrant executed upon a home. And there was 42 days from that alleged incident that the defendant in the case was subsequently arrested and charged with the drug offense. And, the Court reviewing that situation and as pointed out by Defense Counsel, one of the considerations in that case was the fact that this person, the defendant was illiterate and it appeared certainly in that case, that he had very little understanding what was occurring. But, the Court went on in the Hernandez case to set out the guidelines which are used in judging whether or not person's rights have been violated. One of the things that they looked at is whether or not the delay is explainable. And in our case, the case that we have

before us today, I believe Sergeant Fowler has explained the delay. Whether or not that prejudiced the defendant is another matter, but he has given an explanation.

He has indicated at that time the lab had a personnel shortage and, I think it is pretty common knowledge that there was a shortage of chemists in that department which backed up the analysis that they were performing. The other thing that we look at is whether or not the delay is deliberate.

Now, Mr. Sherman suggests in his argument that because of a motion filed to return property and the like that there might have been something under the table that made this deliberate. I don't see it that way. The important issue though, is whether or not the delay of some 225 days caused this defendant undue prejudice, and I believe that Mr. Sherman has made a pretty good case, in my opinion, in support of that.

First of all, we are dealing here with a business establishment. Officer Fowler has indicated that it was a beauty-type barber shop type business and one would expect large number of people coming and going from that type of establishment. He indicated that the drugs were found in one of the back rooms. Some were found in a jacket. He, for purposes of hearing, was not able to clearly identify where the other drugs were found.

The jacket, according to Sergeant Fowler, was not confiscated. He indicated that they did have proof of residency and, apparently, they are relying on that. But, the Court case, the case of Hernandez and the other cases which are in this area, look to whether or not the delay -- and there is no particular number of days involved -- but whether or not sufficient time has expired that would cause the Defense. And the Defense have said they have trouble finding out who was there, and that is understandable.

It is a business place. They have trouble finding out who was there at that time who could give testimony in their behalf. They also indicated that they have a problem remembering the details of the situation with the expiration of the time that was involved here.

Now, I believe that looking at this matter of balance that this defendant would have a tough time defending himself against these charges because of the problem of finding witnesses and being able to clearly remember the events of that particular time. And, there is, in my opinion, undue prejudice because of the delay. And, at this time, although the intentions of the police seem to be within reason, they are just working with a very difficult situation or were working with a very difficult situation at that time. But it appears that this defendant would be unduly prejudiced

> to permit this to continue and for that reason the complaint is dismissed and the defendant is discharged from this complaint. (T 32-36) (Emphasis Added)

The Court's holding itself demonstrates that the court found no deliberate delay on the part of the police to gain tactical advantage and ultimately found that respondent had presented a "theory" of prejudice which it believed was plausible.

The Michigan Court of Appeals upheld the dismissal, rejecting the People's argument that purposeful delay in order to gain a tactical advantage was a necessary element of a due process delay in charging claim, and rejecting the People's claim that substantial prejudice had not been demonstrated. Instead the court found that upon a showing of "some" prejudice the burden shifted to the State

to explain the delay, and then a balancing process between the reason for the delay, and the strength of the prejudice, was undertaken. The People then applied for leave to the Michigan Supreme Court, requesting that court to resolve whether a due process delay in charging claim requires <u>both</u> 1)actual and substantial prejudice, and 2)purposeful delay in order to gain a tactical advantage. That court denied leave to appeal, two justices dissenting.

REASONS FOR GRANTING THE WRIT

Since this Court's decision in United States v Lovasco, 431 US 783 (1977) lower federal courts, state courts, and litigants, have struggled to ascertain the requirements for a due process delay in charging claim, with conflicting results. At least five federal circuits hold that improper motive--deliberate delay in order to gain a tactical advantage--is a requirement for the success of a due process claim. See e.g. United States v Lebron-Gonzalez, 816 F 2d 823 (CA 1, 1987), Hoo v United States, 825 F 2d 667 (CA2, 1987); United States v Ismaili, 828 F 2d 153 (CA3, 1987); United States v Jenkins, 701 F 2d 850 (CA10, 1983); United States v Caporale, 806 F 2d 1487 (CA 11, 1986). At least two circuits, on the other hand, have taken

the position, consistent with that of the Michigan Court of Appeals in this case, that the test is a balancing of prejudice and the explanation for the delay. See e.g. United States v Valentine, 783 F 2d 1413 (CA9, 1986); United States v Automated Medical Laboratories, 770 f 2d 339 (CA4, 1985). Moreover, several circuits have internal conflicts on the issue. See Dickerson v Louisiana, 816 F 2d 220 (CA5, 1987); United States v Hollins, 811 F 2d 384 (CA7, 1984). These conflicts were noted by Justice White dissenting from the denial of certiorari in Hoo v United States, 98 L Ed 2d 777 (1988).

Moreover, state courts are not consistent on this issue, and consequently are on one side or the other of the split among federal circuits. For

example, the Supreme Court of Illinois in People v Lawson, 367 NE 2d 1244 (1977) rejected a claim that Lovasco requires intentional delay to disadvantage the accused, but see State v Grissom, 746 P 2d 661 (NM App, 1987), citing Jenkins with approval.

Michigan, like most jurisdictions, has a statute of limitations for criminal actions. That governing the crime involved here is 6 years. If, as courts have repeatedly held, the statute of limitations is the primary guarantee against stale charges, with the due process clause to play only a limited role, then a delay of 225 days between the crime here and the formal charging of the defendant, where the statute of limitations is 6 years, should not be found to violate due process absent a

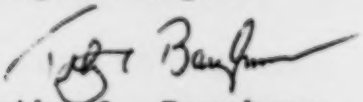
finding of improper motive. Petitioner requests this Court grant leave to resolve this issue of national importance, upon which the courts are split.

CONCLUSION

WHEREFORE, for the reasons above stated, Petitioner submits that plenary review should be granted.

Respectfully submitted,

John D. O'Hair
Prosecuting Attorney
County of Wayne



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STATE OF MICHIGAN
IN THE COURT OF APPEALS

THE PEOPLE OF THE STATE OF MICHIGAN
PLaintiff-Appellant,

v

June 9, 1988

REGINALD D. LEIGH,
Defendant-Appellee. No. 99662

BEFORE: D.E. Holbrook, Jr., P.J., and MacKenzie and N.A. Baguley*, JJ.

PER CURIAM

Defendant was charged with possession with intent to deliver less than 50 grams of cocaine, MCL 333.7104(1)(2)(a)(iv); MSA 14.15(7104)(1)(2)(a)(iv). The prosecutor appeals as of right from a Recorder's Court order dismissing the charge. We affirm.

The dismissal stems from defendant's claim that he was denied due process

*Circuit judge, sitting on the Court of Appeals by assignment

because 225 days elapsed between his arrest and the initiation of prosecution against him. The record establishes that the police executed a search warrant at defendant's business, Reggie's Styles Unlimited hair salon, on May 8, 1986. Several people were in the salon at the time. During the search, Officer James Willis retrieved from a yellow sport jacket he found hanging in a back room a bundle of 20 coin envelopes containing cocaine and paperwork with defendant's name. Defendant was arrested and later released from police custody when no complaint and "in-custody" warrant were issued. A complaint and "not-in-custody" warrant were eventually issued on December 2, 1986. Defendant was arraigned on December 18, 1986, 225 days after his original arrest.

In People v Bisard, 114 Mich App 784, 791; 319 NW2d 670 (1982), this Court

stated the test to be used in determining whether a delay in instituting prosecution denies a defendant due process:

> "(O)nce a defendant has shown some prejudice, the prosecution bears the burden of persuading the court that the reason for the delay is sufficient to justify whatever prejudice resulted. This approach places the burden of coming forward with evidence of prejudice on the defendant, who is most likely to have facts regarding prejudice at his disposal. The burden of persuasion rests with the state, which is most likely to have access to facts concerning the reasons for delay and which bears the responsibility for determining when an investigation should end."

See also People v Bargo, 139 Mich App 573; 362 NW2d 840 (1984); People v Shelson, 150 Mich App 718; 389 NW2d 159 (1986); lv den 426 Mich 862 (1986); People v Dungey, 147 Mich App 83; 383 NW2d 128 (1985).

Defendant's contention was that the yellow jacket containing the cocaine was not his and was too small to fit him. By

December, the jacket was missing. At the hearing on defendant's motion to dismiss, defense counsel claimed that the delay prejudiced defendant's efforts to determine the owner of the yellow jacket. Counsel pointed out that there were several employees and customers in the salon at the time the warrant was executed, and that the back room was routinely used as a lounge by customers and apparently employees so that the jacket could belong to anyone. By December, defendant had forgotten the names of everyone present on May 8 and had been unable to locate some of those persons whose presence he did recall and who might know to whom the jacket belonged.

Police officer Franscott Fowler, who was involved in the execution of the search warrant on May 8, testified that

the primary reason for the delay was that a laboratory analysis of the cocaine was needed before a warrant could be issued, and that due to a shortage of technicians that analysis was not completed until August 30, 1986, Fowler offered no explanation for the 94 day delay between completion of the analysis and issuance of the complaint and warrant. Fowler further testified that the police originally sought a complaint and warrant from the prosecutor's office in May, but that the prosecutor "wanted the officers who found the narcotics to have (identification numbers of the) lock seal folder(s) in which the narcotics (were) placed on...their PCR's and not just on the Evidence Officer's PCR's". On cross-examination, Fowler estimated transferring the numbers would take approximately five minutes.

The trial court ruled as follows:

> "Now, I believe that looking at this matter on balance that this defendant would have a tough time defending himself against these charges because of the problem of finding witnesses and being able to clearly remember the events of that particular time. And, there is, in my opinion, undue prejudice because of the delay. And, at this time, although the intentions of the police seem to be within reason, they are just working with a very difficult situation or were working with a very difficult situation at that time. But it appears that this defendant would be unduly prejudiced to permit this to continue and for that reason the complaint is dismissed and the defendant is discharged from this complaint".

The prosecution contends that the trial court clearly erred in finding that defendant had shown prejudice because of the delay, the first part of the Bisard test. More specifically, the prosecution suggests that "the Bisard court's statement that the defendant carries the burden of showing 'some' prejudice was an inadvertent error." According to the

prosecution, defendant had to show actual and substantial prejudice and purposeful delay to gain tactical advantage in order to meet his burden of going forward. We disagree with the prosecution's analysis. We think that the Bisard panel's adoption of the "some prejudice" standard was deliberate rather than "inadvertent error". The crux of the Bisard test is the balancing of prejudice to defendant against the reasonableness of the delayed prosecution. Under the prosecution's proposed test, there would be no need to balance; either the scale would inevitably tip toward the defendant or the court would not reach the balancing stage because the defendant could not meet the stringent burden the prosecution would have imposed.

In this case, the court found that the defendant had adequately shown prejudice

and we are not convinced that this determination was erroneous. Nor can we say that the court erred in finding the reason for the delay--understaffing in the laboratory--was sufficient to justify the delay. Compare Dungey, supra. In any event, this explanation completely failed to account for 94 days of the delay. Accordingly, we affirm the ruling of the trial court that on balance, the prejudice to defendant outweighed the reasons provided by the state for the delay.

Affirmed.

/s/Donald e. Holbrook, Jr.

/s/Barbara b. MacKenzie

/s/Norman A. Baguley

APPENDIX B
MICHIGAN SUPREME COURT

ORDER
Entered: September 13, 1988

83641

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v

SC:83641
COA:99662
LC:87-00032

REGINALD D. LEIGH
Defendant-Appellee.

On order of the Court, the application for leave to appeal is considered, and it is denied, because we are not persuaded that the question presented should be reviewed by this Court.

Brickley and Boyle, JJ, would grant leave to appeal.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of

the order entered at the direction of the court.

September 13, 1988 /s/Corbin R Davis